

No. 85-5348 ⁽⁵⁾

Supreme Court, U.S.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1986

DAVID BUCHANAN, Petitioner

versus

COMMONWEALTH OF KENTUCKY, Respondent

On Writ of Certiorari to the Supreme Court of Kentucky

BRIEF FOR RESPONDENT

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QUESTIONS PRESENTED

I.

In a joint trial for capital murder, where the death penalty is sought against one defendant but not the other, does the state by death-qualifying the jury deprive the latter defendant of an impartial jury, representative of a fair cross-section of the community?

II.

Where the defendant himself obtains a psychiatric examination in an attempt to obtain involuntary commitment, is it constitutionally permissible for the state to introduce findings from that examination for the sole purpose of rebutting other psychological evidence presented by the defendant to establish a mental status defense?

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 DAVID BUCHANAN, - - - - *Petitioner*
v.
 COMMONWEALTH OF KENTUCKY, - *Respondent*

On Writ of Certiorari to the Supreme Court of Kentucky

BRIEF FOR RESPONDENT**OPINION BELOW**

The opinion below is reported as *Buchanan v. Commonwealth*, Ky., 691 S. W. 2d 210 (1985). On direct appeal of conviction, the Kentucky Supreme Court affirmed Petitioner's life sentence and terms of years for the sodomy, rape, robbery, and murder of a Louisville gas station employee named Barbel Poore.

The court below rejected Petitioner's contention that the exclusion of persons unwilling to comply with the oath of juror, by considering imposition of the death penalty in a capital case, results in a jury more likely to convict than it otherwise would have been. Petitioner's argument that the exclusion of such persons renders the jury unrepresentative of the community was likewise rejected. The court held that in a

joint trial where capital punishment is sought against one defendant but not the other, impanelling a "death qualified" jury does not deprive either defendant of an impartial jury representative of a fair cross-section of the community. Thus the court's ruling applies equally to a defendant for whom the death penalty is sought, and one such as Petitioner who is properly joined with him for trial¹ but does not face capital punishment.

In addition, the court below found that Petitioner's privilege against self-incrimination was not violated by the introduction of a post-arrest mental status report, offered in rebuttal of three other such reports made prior to the crimes at issue. The court held that the three reports introduced by Petitioner were not evidence of extreme emotional disturbance, a statutory mitigating factor which was his sole theory of defense. The court further held that any possible error would have been non-prejudicial because the report introduced in rebuttal was actually cumulative, and harmless because Petitioner had waived his rights in a prior confession and the other evidence of his guilt was overwhelming.

JURISDICTION

United States Supreme Court Rules 15.1(a) and 21.1(a) in pertinent part state:

The statement of a question presented will be deemed to comprise every subsidiary question

¹Petitioner conceded that joinder with his co-defendant was proper by failing to question this either at trial or on appeal.

fairly included therein. Only the question set forth in the jurisdictional statement or fairly included therein will be considered by the Court.

The Court generally has declined to address claims presented for the first time on certiorari review, or those beyond the legitimate scope of the question for which review was granted. *See: e.g., Murray v. Carrier*, — U. S. —, 106 S. Ct. 2639 (1986); *Smith v. Murray*, — U. S. —, 106 S. Ct. 2661 (1986); *Hill v. California*, 401 U. S. 797, 805-806 (1971); *Cardinale v. Louisiana*, 394 U. S. 437, 438-439 (1969); *Lawn v. United States*, 355 U. S. 339, 362, n.16 (1958); *Lear, Inc. v. Adkins*, 395 U. S. 653, 675 (1969). *Compare: Batson v. Kentucky*, — U. S. —, 106 S. Ct. 1712 (1986).

In his brief to this Court, Petitioner attempts to raise constitutional claims which were not presented in his petition for writ of certiorari, nor in his appeal below to the Kentucky Supreme Court. Only after certiorari was granted has Petitioner attempted to invoke Equal Protection² and Freedom of Expression with respect to the issue concerning "death qualification" of his jury.

In his appeal to the Kentucky Supreme Court, Petitioner confined his constitutional claims to Due Process and the Sixth Amendment's fair cross-section requirement:

²One of Petitioner's pre-trial motions recited Equal Protection as a reason to preclude death-qualification in "capital cases," but he abandoned that claim on direct appeal. (JA 6)

"Appellant's trial by a death-qualified jury, where he did not face the sanction of capital punishment, violated due process of law by effectively impanelling a conviction-prone jury, and further, denied appellant due process by excluding a jury chosen from a fair cross-section of the community."

Not once did his brief even mention Equal Protection or Freedom of Expression. Accordingly, the Kentucky Supreme Court limited its review to only those claims presented for its consideration.

In his petition for writ of certiorari, Petitioner likewise asserted that Due Process and the Sixth Amendment's fair cross-section requirement were the only constitutional provisions involved here. Thus with respect to the death-qualification of the jury, his question presented for review was:

"Whether petitioner's trial by a death qualified jury where he did not face the sanction of capital punishment, violated due process of law by effectively impanelling a conviction-prone jury, and further, denied petitioner due process and his sixth amendment rights by excluding a jury chosen from a fair cross-section of the community?"

Only after certiorari was granted on this issue did Petitioner seek to expand the scope of his argument to include Equal Protection and Freedom of Expression claims, as well as a challenge to the prosecutor's use of peremptory strikes, none of which are properly before the Court. In short, the question Petitioner now attempts to present is not the one for which certiorari was granted:

"Did the federal constitution permit the state to eliminate, by peremptory and cause challenge, 20% of the qualified venire based on religious or political views on capital punishment when the state did not seek the death penalty against petitioner at a joint capital/non-capital trial?"

In the text of his brief Petitioner strays even farther afield, claiming that the very means by which the jury was death-qualified amounts to constitutional error in and of itself. This he does in sub-part (J) of his argument, entitled "Unconstitutional Death-Qualification Under Witherspoon/Adams/Witt," at pages 46-51 of the brief.

Until now, the particular persons whose exclusion Petitioner complained about were only those individuals unwilling to comply with the oath of juror by considering imposition of the death penalty in a capital case. In his brief on writ of certiorari, however, Petitioner further challenges the peremptory exclusion of even those jurors whose opposition to capital punishment does not prevent them from considering the death penalty, and thus are qualified to serve. Petitioner ventures outside of the record in his complaint about the alleged exclusion of Democrats who, he contends, are more lenient than Republicans. Nothing in the record divulges the jurors' political party affiliation. The voter registration books relied upon at page 41 of Petitioner's brief are not part of the record in this case. Nor are any of the various newspaper articles he cites. *See: Lawn v. United States, supra*, at 364.

Most illustrative of all is the conclusion of Petitioner's argument, wherein he entreats the Court to choose from this veritable shopping list of unpreserved constitutional claims. At page 51 of his brief, Petitioner asserts that whatever "constitutional handle one attaches to the problem" is unimportant because "David Buchanan was prejudiced."

Therefore, Respondent respectfully submits that the Court lacks jurisdiction to consider the various grounds which are extraneous to the question presented in the petition. In observance of the Court's procedural rules on the matter, the brief for Respondent is confined to a discussion of only those claims for which certiorari has been granted, i.e., Due Process and the fair cross-section requirement of the Sixth Amendment.

Respondent does not challenge jurisdiction with respect to the "*Estelle v. Smith*" issue.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution in pertinent part states:

No person . . . shall be compelled in any criminal case to be a witness against himself.

The Sixth Amendment to the United States Constitution in pertinent part states:

In all criminal prosecutions the accused shall enjoy the right to a . . . trial, by an impartial jury . . . and to have the assistance of counsel for his defence.

The Fourteenth Amendment to the United States Constitution in pertinent part states:

(N)or shall any State deprive any person of . . . liberty . . . without due process of law. . . .

COUNTERSTATEMENT OF THE CASE

Respondent does not accept Petitioner's statement of the case, and urges the Court to adopt the following account of the material facts.

The victim in this case, twenty year old Barbel Poore, was an employee of the Cheker gas station on Cane Run Road in Louisville, Kentucky. (TE 399, 942, 947) She and her parents were acquainted with Petitioner's co-defendant, Kevin Stanford, having conversed with him on several occasions. (TE 519) Stanford lived in the apartment complex adjoining the Cheker station. (TE 407-408, 475)

Troy Johnson was a mutual friend of both Stanford and Petitioner. (TE 1029, 1047) On January 7, 1981 Petitioner approached Johnson with a plan to rob the Cheker station. (TE 1029-1030) Petitioner explained that it would be easy because the victim would be there all by herself. (TE 1031) After assuring Johnson that the victim would not be harmed, Petitioner asked him for a gun to use in the robbery. (*Id.*) Johnson borrowed a handgun . . . onging to his brother and loaned it to Petitioner, who then had him procure some ammunition for the gun. (*Id.*)

Petitioner then telephoned Stanford in regard to the plan. (TE 1032-1033) Later that afternoon, John-

son drove Petitioner to Stanford's apartment complex. (*Id.*) Upon meeting with Stanford, Petitioner instructed Johnson to wait for them in the car. (TE 1033-1034) Stanford remarked that the victim might recognize his clothing. (*Id.*)

Johnson waited inside his car for approximately thirty minutes, when Petitioner returned with a two-gallon can of gas and placed it inside the car. (TE 1034-1035, 1053) Petitioner instructed Johnson to continue waiting, and then returned to the Cheker station for another fifteen minutes. (*Id.*)

Barbel Poore was robbed, raped, orally sodomized, and anally sodomized during this period of time. (TE 364-365, 372, 398, 405, 485-486, 946, 1044) Petitioner would later confess that he:

. . . went into the restroom and [Stanford] was having intercourse with the service station attendant and they were standing up. He said that the clothes were off of the service station attendant from the mid section down, but that she did have her top on. He stated that he and [Stanford] then put the service station attendant on the floor and they each took turns raping and sodomizing the service station attendant on the floor of the restroom. (TE 485)

Petitioner eventually returned to Johnson's car a second time and instructed him to follow Stanford, who was driving the victim in her own car. (TE 1035-1037) After both cars arrived at a secluded area on Shanks Lane in Louisville, Petitioner got out and walked over to the victim's car where Stanford was

standing. (*Id.*) After Stanford shot her the first time, Petitioner began walking away as the second shot was fired. A motorist, who happened by the area in time to hear the gunshots, observed that the apparent gunman was "tagging behind" the other subject on their way back to the getaway car. (TE 954-955, 957, 963)

Later that evening, Petitioner boasted to Johnson about what he had done to the victim at the Cheker station. (TE 1044) In addition to the fact that he raped and then sodomized her, Petitioner described the victim's plea for him to end the sexual attack, which he refused. (*Id.*) Petitioner and Johnson watched a television newscast concerning the murder. (TE 1045) Petitioner explained that the newscast was inaccurate about the position in which the victim's corpse was left. (*Id.*) He told of how the first gunshot, the one to her face, caused the victim to begin falling over in the back seat of the car before the insurance gunshot was fired into the back of her head. (TE 1046)

Also later that evening, the victim's mother and a fellow employee named Jesse Ortagia stopped at the Cheker station on their way home from work. (TE 931-932) Mr. Ortagia noticed that the lights and the gas pumps were still turned on, even though the station should have been closed for at least three hours by then. (TE 399-400, 933) When Mr. Ortagia saw that the inside of the station had been ransacked, he telephoned the police. (TE 934)

The victim's car was located soon after the police investigation began:

She had her pants, blue jeans and panties down around her ankles, her buttocks were exposed up in the air. * * * * She was kneeling on the floorboards of the car and her face was on the seat in the rear of the car. (TE 401)

At trial, Petitioner's lawyer conceded that he had committed the robbery. (TE 1205, 1207, 1246-1247, 1289) In addition, expert forensic testimony established that one of the several foreign hairs found on the victim's buttocks belonged to Petitioner. (TE 578, 585, 645, 794, 805)

Although his confession to the police was introduced into evidence, Petitioner did not take the witness stand. (TE 482-486)

Petitioner's sole defense witness was one of his former social workers, Martha Elam. (TE 1115) On direct examination, she testified from a series of mental status reports concerning Petitioner's mental capacity, emotional status, and attitude toward his prior criminal offenses. (JA 39-53) Such testimony established that Petitioner:

- (i) had a full scale intelligence quotient of 74,
- (ii) on several occasions had been charged with felonies ranging from theft to robbery,
- (iii) suffered poor impulse control,
- (iv) had the "potential for developing a full-blown schizophrenic disorder",
- (v) was "paranoid", and

- (vi) "could be expected to be dangerous with respect to acts against other persons."

The foregoing mental status reports had been made several months prior to the crimes at issue here. (JA 40, 44-45)

During cross-examination of this witness, the prosecutor was permitted over Petitioner's objection to rebut such evidence by having her recite excerpts from a mental status evaluation report made several months after the subject crimes were committed. (JA 55-59) In pertinent part, the report noted the following observations:

He was neither especially hostile nor friendly, mainly tolerant and cooperative. The discussion focused on the hear (sic) and now since goal was to ascertain meeting of the 202A criteria or not. He was in good reality contact and reasonable knowledge of current events outside the center and seemed to be functioning in full normal I.Q. range. Short and long term memory appeared intact. There was not evidence of hallucinations or delusions. [Affect] was generally shallow without imporia or disporia. He seemed somewhat optimistic about the outcome of the charges pending against him. No suicidal obviation is present, although, David states at times he has been very angry at certain people, staff at the center and thought about hurting them. David was not especially anxious or restless except initially and

seemed overall relaxed. And it's signed by Robert Ryan³, M.D. (JA 58-59)

The jury found petitioner guilty of robbery, rape, sodomy, and murder. (JA 76-77) Petitioner's life sentence for murder was ordered to be served concurrently with consecutive twenty year prison terms for each of the other crimes. (JA 78) Stanford, a juvenile the same as Petitioner, was tried in the same proceeding and received identical prison sentences for the sodomy and robbery, as well as a five year term for a related charge of receiving stolen property. (TR 81CR1218, 18-21, 28-31) Following a bifurcated penalty proceeding for Stanford's murder conviction, he was sentenced to death. (TE 1542; TR 82CR0406, 314) The juvenile court did not waive jurisdiction over Johnson, however, who had done little more than drive the getaway car. (TE 1048-1050) As a result, he was never eligible for trial as an adult felon. (*Id.*)

SUMMARY OF ARGUMENT

I

In capital prosecutions, the State has a legitimate interest in impanelling only those jurors who are willing to comply with their oath by considering the death penalty as a possible sentencing option. Death-qualifying the jury ensures that those who serve will decide

³This appears to be a typographical error on the part of the court stenographer, since according to the report itself the examiner was Robert Lange, M.D. (JA 72-73) The opinion below refers to him as "Dr. Ryan." *Buchanan v. Commonwealth, Ky.*, 691 S. W. 2d 210, 213 (1985).

guilt and punishment according to the law and facts of the case.

The State has an equally important interest in having a single jury decide the guilt and punishment of all the participants in the crime. Joinder of defendants for trial necessarily affords the jury a greater perspective than it would have had in a separate trial. As a result, the jury is better equipped to compare the defendants' relative degrees of culpability in the same crime. This promotes reliability in the jury's findings, and avoids inconsistent results.

Both of the foregoing interests are at stake in cases where, as here, not all of the participants in a capital offense are eligible for the death penalty. Both of these interests are served by permitting the State to death-qualify the jury in joint trials of capital and non-capital defendants. The impartiality of a death-qualified jury is not lessened by the additional consideration of a non-capital co-defendant in the crime.

Such a procedure does not deprive the non-capital co-defendant of any specific right guaranteed by the Constitution. Joinder of defendants for trial, even if improper, is not a constitutional violation in and of itself. Deprivation of a specific right must be shown to have occurred, which Petitioner is unable to do. Neither does death-qualifying the jury in a capital proceeding, in and of itself, result in a specific constitutional violation.

Petitioner has never questioned the appropriateness of being tried together with his capital co-defendant.

Instead, his argument has been directed at the fairness of death-qualifying juries in capital cases generally. He complains that the process excluded jurors for a reason unrelated to his case. But because his case was part of the *whole* case before the jury, which involved a co-defendant who did face the death penalty, Respondent submits it was enough that the jurors were excluded for reasons relating to their ability to decide the *case*.

The Sixth Amendment's fair cross-section requirement applies to jury venires, not petit juries themselves. Even if it did apply to petit juries, Petitioner would have to show that opponents of capital punishment make up a distinct or recognizable group, which he cannot do. Groups defined only by shared attitudes are not cognizable as a class for purposes of fair cross-section analysis.

The procedure employed here did not offend Fourteenth Amendment Due Process, but resulted in a constitutionally impartial jury. Petitioner does not allege that any of the jurors impanelled in his case were specifically biased. He instead relies exclusively upon social science studies and opinion polls which would impute juror bias. The Constitution does not assume juror bias. Rather, it presupposes impartiality on the part of all jurors who express their willingness to decide the particular case according to the law and evidence. Petitioner has no constitutional right to impanel partisan jurors.

The rule urged by Petitioner would have widespread application, affecting all prosecutions involving multiple defendants or multiple charges, even in purely non-capital contexts. It would needlessly generate additional litigation in all instances where a juror is subject to exclusion for cause related to one, but not all aspects of the particular case. Respondent submits that logically if the jury is impartial with respect to the capital defendant, it is no less impartial as to his non-capital co-defendant.

II.

In Kentucky, a defendant is guilty of murder when 1) the defendant intends to cause the death of another person, and 2) he causes the death of that person or another. However, a finding of murder may be reduced to first degree manslaughter if the jury finds that the defendant acted under the influence of "extreme emotional disturbance." The defendant bears the burden of production and the risk of non-persuasion on this mitigating circumstance of "extreme emotional disturbance." To raise the issue, the defendant must show 1) that he was provoked by some event, and 2) that his response to this provocation was reasonable under the circumstances as he believed them to be. Evidence of mental illness may assist the jury in assessing the reasonableness of the defendant's response, but does not, by itself, constitute extreme emotional disturbance. Where evidence of mental illness is presented, without evidence of the triggering element of

provocation, the defendant has simply put on some proof of insanity. If the defendant has failed to specifically plead insanity or if the jury is not convinced that he was insane when he committed the offense, such evidence of mental illness simply presents a "failed" insanity defense. In the present case, Buchanan presented a "failed" insanity defense by introducing the reports of three psychologists, who had examined him prior to the commission of these offenses.

This Court indicated in *Estelle v. Smith*, 451 U. S. 454 (1981), that a defendant who initiates a psychiatric evaluation or attempts to introduce psychiatric evidence may be compelled by the state to respond to a psychiatrist. Furthermore, a majority of the federal circuits have affirmatively held that a defendant may be compelled to submit to a psychiatric examination, without violating his privilege against self-incrimination, where the defendant has raised the insanity defense or has introduced psychiatric evidence to support such a defense. See *United States v. Byers*, 740 F. 2d 1104 (D.C. Cir. 1984) (Scalia, J.). The central thread running through these decisions is the recognition that, under these circumstances, the defendant's silence may deprive the state of the only effective means it has of controverting the defendant's proof on an issue that he interjected into the case. The federal courts have also consistently recognized that the only effective rebuttal of psychiatric opinion testimony is contradictory opinion testimony. Although these decisions speak specifically of the insanity defense, the

underlying considerations apply with equal force to the defense of extreme emotional disturbance. Under each of these mental status defenses, the defendant may, in effect, "testify" through his experts. Such a defendant should not be allowed to use the Fifth Amendment as a shield to distort the truth. Where a mental status defense is asserted, the state must be given the opportunity to effectively test such evidence, in order to preserve judicial integrity and to assist juries in their truth-finding function.

Buchanan's primary defense, throughout this prosecution, was that, if he had any involvement in the killing of Barbel Poore, he could only be guilty of manslaughter because he acted under the influence of extreme emotional disturbance. Prior to trial, defense counsel moved the court to order a "202A examination," by a psychiatrist, to determine whether Buchanan was mentally ill and a danger to himself or others. At trial, Buchanan's sole witness was his social worker. Through her testimony, Buchanan introduced the results of three psychological examinations, which he had undergone prior to the crime. During this testimony, the jury was informed five times that Buchanan was "emotionally disturbed." Because Buchanan introduced psychological evidence in support of his mental status defense, the prosecutor could have compelled him to submit to a psychiatric examination, without violating his privilege against self-incrimination. Instead, the prosecutor chose a less intrusive procedure to rebut this evidence. Through cross-examination of

the social worker, the prosecutor introduced the psychiatrist's findings, based upon the 202A examination. There was no violation of the Fifth Amendment.

Buchanan cannot fairly argue that he was not afforded his Sixth Amendment right to consult with counsel prior to the 202A examination. Defense counsel requested the examination. Therefore, there is every reason to believe that defense counsel consulted with him prior to making the request.

If the Court should decide that the introduction of this psychiatric opinion evidence violated Buchanan's rights under the Fifth or Sixth Amendment, such a finding would only affect his murder conviction. In any event, such error should be deemed harmless beyond a reasonable doubt, based upon the overwhelming evidence of Buchanan's guilt.

One of his confederates detailed Buchanan's planning of and participation in the crimes. A forensic scientist testified that hairs found on the victim's body matched head and pubic hair standards taken from Buchanan. Most importantly, the jury was informed that Buchanan had admitted his participation in the robbery and sexual offenses, to the police. Buchanan had also described the killing to police and admitted being present when Stanford killed Barbel Poore. Based upon this overwhelming evidence of guilt, the Court should conclude that any error, if error did occur, was harmless beyond a reasonable doubt.

ARGUMENT

I.

Where the Accused Is Properly Joined for Trial With a Co-defendant Eligible for More Severe Punishment, Sentence-Qualification of the Jury Does Not Deprive Either Defendant of an Impartial Jury, Representative of a Fair Cross-section of the Community.

Constitutional claims identical to the ones presented here, involving jury impartiality and representativeness in the context of a capital trial, were considered and rejected by this Court in *Lockhart v. McCree*, — U. S. —, 106 S. Ct. 1758 (1986). Petitioner challenges the for-cause exclusion of the same category of potential jurors, those who are unwilling to comply with the oath of juror by considering imposition of the death penalty in a capital case, as that challenged in *McCree*. He argues, the same as was done in *McCree*, that such persons make up a recognizable and distinctive group without whom the jury is not representative of the community. Similarly, Petitioner contends that the exclusion of such individuals results in a jury statistically more likely to convict than it otherwise would have been. And like the defendant in *McCree*, Petitioner asserts that for these reasons, "death qualification" of the jurors violates his Fourteenth Amendment Due Process and Sixth Amendment rights to an impartial jury representative of a fair cross-section of the community.

The only difference between *McCree* and the instant case is that here Petitioner did not risk capital punish-

ment himself, but instead was properly joined for trial with a co-defendant who did face the death penalty.

Petitioner can no more prove jury partiality in the present case than did the respondent in *McCree*. Logically, if the jury is "impartial" as to the defendant who is on trial for his very life, then it follows that the same jury is impartial with respect to his non-capital co-defendant as well. Joinder of the latter defendant in such a case does not perforce affect the jury's impartiality. This would appear to hold true whether joinder of defendants, in and of itself, is proper or not.

Petitioner was properly joined for trial with his co-defendant, Kevin Stanford. Both were juveniles, and they had been indicted for the same crimes, sodomy, robbery, and capital murder, against the same victim. In addition, Petitioner had been indicted for the rape of this victim, while Stanford had been indicted for a related charge of receiving stolen property. (TR 81CR1218, 18-21, 28-31)

Section 9.12 of the Kentucky Rules of Criminal Procedure, (RCr) entitled Consolidation of Offenses For Trial, stated:

The court may order two (2) or more indictments or informations or both to be tried together if the offenses, and the defendants, if more than one (1), could have been joined in a single indictment or information. The procedure shall be the same as if the prosecution were under such single indictment or information.

RCr 6.18, entitled Joinder Of Offenses, stated:

Two (2) or more offenses may be charged in the same information or two (2) or more offenses whether felonies or misdemeanors, or both, may be charged in the same indictment in a separate count for each offense, if the offenses are of the same or similar character or are based on the same acts or transactions connected together or constituting parts of a common scheme or plan.

RCr 6.20, entitled Joinder Of Defendants, stated:

Two (2) or more defendants may be charged in the same indictment or information if they are alleged to have participated in the same act or transaction or in the same series of acts or transactions constituting an offense or offenses. Such defendants may be charged in one or more counts together or separately and all of the defendants need not be charged in each count.

Under Kentucky law, a criminal defendant who feels that such joinder will be unduly prejudicial must file a motion for severance pursuant to RCr 9.16 and make a pre-trial showing of how joinder would be unfair. *Commonwealth v. Rogers*, Ky., 698 S. W. 2d 839 (1985). The trial judge is vested with wide discretion in making this determination. *Wilson v. Commonwealth*, Ky., 695 S. W. 2d 854 (1985).

By failing to request severance at trial, or assign the matter as error on appeal to the Kentucky Supreme Court, Petitioner has conceded that joinder was proper in this case.⁴ Consequently, as far as his complaint

⁴Stanford requested severance on his own behalf, but the showing he had to make was different than what would have been re-

(Footnote Continued on Next Page)

about the fairness of death qualifying the jury is concerned, Petitioner stands in the same shoes as his capital co-defendant.

He appears to have preferred it that way, at least for purposes of trial. It is inconceivable that Petitioner's failure to request severance of defendants was an oversight. Petitioner had already confessed, and the other evidence of his guilt was so overwhelming that the robbery charge went uncontested. (TE 482-485, 1205, 1207, 1246-1247, 1289) All the evidence would point to Stanford as the triggerman, but the extent of Petitioner's involvement in the events leading up to the actual shooting was equally impressive. Petitioner had planned the robbery; he enlisted the assistance of Stanford and Johnson; Petitioner timed the robbery so that the victim would be closing up and alone; he had the same motive as Stanford for permanently silencing the victim; Petitioner not only procured the weapon used to kill the victim, but insisted that ammunition be supplied for the gun; Petitioner directed Johnson to follow Stanford from the robbery scene to the murder scene. *Buchanan v. Commonwealth*, Ky., 689 S. W. 2d 210, 211-212 (1985). Although the evidence would show that Stanford was the actual trig-

(Footnote Continued From Preceding Page)

quired of Petitioner. (TR 81CR1218, 198-200; 3/1/82 PTH 184-186) The trial judge's *sua sponte* ruling that an objection by one defendant is an objection by both was made sometime after the denial of Stanford's severance motion, and appeared to apply only to matters of jury selection. (JA 28)

german in the murder,⁵ the significance of this distinction could have been lost on the jury in his absence from Petitioner's trial. Thus, Petitioner seems to have made a conscious and deliberate decision to not request separate trials.

The extra measure of perspective necessarily afforded the jury in a joint trial, especially where the defendants' degree of participation is relatively high, serves to further the truth finding process. Allowing the jury to see the entire picture increases the reliability of its factual findings, and having the same jury sentence the defendants tends to ensure against disparate punishment.⁶ This is why Petitioner had no objection to his joinder with Stanford, who himself could not have fared any better in a separate trial. The government, as well as the defendants, had a legitimate interest in having the same jury decide the cases together for these very reasons.

In *United States v. Lane*, — U. S. —, 106 S. Ct. 725, 730, n.8, (1986), it was observed that:

⁵Petitioner was aware of this prior to the trial. It was the very reason he gave in his pre-trial motion to preclude death as a possible punishment against him, citing *Enmund v. Florida*, 458 U.S. 782 (1982). (JA 19-23) Under recent interpretations of *Enmund*, the prosecutor's concession on this point appears to have been a windfall for Petitioner. *E.g.*, *Ross v. Kemp*, 756 F. 2d 1483 (11th Cir. 1985). In his brief, Buchanan gives the impression that shortly after his conviction the Kentucky Legislature abolished the death penalty with respect to juvenile offenders. This is incorrect. See Ky. Rev. Stat. 635.125.

⁶Inconsistent results are precisely what the legal system is designed to avoid, and they can only undermine public confidence in such a system.

Improper joinder does not, in itself, violate the Constitution. Rather, misjoinder would rise to the level of a constitutional violation only if it results in prejudice so great as to deny a defendant his Fifth Amendment right to a fair trial.

Thus, a specific constitutional violation must be shown to have resulted from the joinder of defendants, which cannot be done under the circumstances of this case. In *Shaffer v. United States*, 362 U. S. 511 (1960), the Court found no constitutional error in a case where the conspiracy charge, which had formed the sole basis for joinder of defendants, was dismissed during the trial. As the Court will see hereinbelow, Petitioner cannot demonstrate that any specific constitutional violation was occasioned by the death qualification of his jury.

FAIR CROSS-SECTION

In *McCree, supra*, the Court reaffirmed its long-standing position that the Sixth Amendment's fair cross-section requirement does not apply to the petit jury, but instead to the venire:

We have never invoked the fair cross-section principle to invalidate the use of either for-cause or peremptory challenges to prospective jurors, or to require petit juries, as opposed to jury panels or venires, to reflect the composition of the community at large. See *Duren v. Missouri*, 439 U. S. 357, 363-364, 99 S. Ct. 664, 668 (1979); *Taylor v. Louisiana*, 419 U. S. 522, 538, 95 S. Ct. 692, 701-702 (1975). "[W]e impose no requirement that petit juries

actually chosen must mirror the community and reflect the various distinctive groups in the population"; cf. *Batson v. Kentucky*, — U. S. —, n.4, 106 S. Ct. 1712, 1716, n.4, (1986) (expressly declining to address "fair cross-section" challenge to discriminatory use of peremptory challenges).

* * * * *

We remain convinced that an extension of the fair cross-section requirement to petit juries would be unworkable and unsound, and we decline *McCree's* invitation to adopt such an extension. 106 S. Ct. 1758, 1764-1765.

In *McCree*, the Court further found that even if *arguendo* the fair cross-section requirement applied to petit juries, there still would be no constitutional violation in this instance. In order to establish that a fair cross-section violation has occurred, the defendant must show that a "distinctive group" was systematically excluded. *Duren, supra*, 439 U. S. 357, 364. This he cannot do:

In our view, groups defined solely in terms of shared attitudes that would prevent or substantially impair members of the group from performing one of their duties as jurors, such as the "*Witherspoon*-excludables" at issue here, are not "distinctive groups" for fair cross-section purposes. *McCree, supra*, 106 S. Ct. 1758, 1765.

DUE PROCESS FAIRNESS

The Court in *McCree* held that the impartiality of a jury is determined by the willingness of the individual jurors to comply with the judge's instructions and

apply the law to the facts of the case. Impartiality in the constitutional sense does not require that any particular blend of attitudes or viewpoints be represented on the jury, but only that such predispositions give way to the law. 106 S. Ct. 1758, 1767. Thus, a juror who harbors a particular attitude but yields to the law in that regard is considered impartial. *Irvin v. Dowd*, 366 U. S. 717, 723 (1961). It is this willingness to fairly decide the case, in spite of one's own preconceived ideas rather than because of them, that determines his impartiality. *Wainwright v. Witt*, 469 U. S. —, 105 S. Ct. 844, 852 (1985); *Smith v. Phillips*, 455 U. S. 209, 217 (1982). In *McCree, supra*, the Court rejected as "illogical and hopelessly impractical" the suggestion that jury impartiality requires a certain mixture of attitudes to be present among the jurors, heedless of their ability to follow the law. 106 S. Ct. 1758, 1767. A given juror's impartiality is not affected by the for-cause exclusion of other jurors.

Because the Constitution "presupposes" the impartiality of a juror who is willing to comply with the law of a particular case, the scientific studies and opinion polls relied upon by *McCree*, and by Petitioner here,⁷ are really beside the point. 106 S. Ct. 1758, 1770. In determining whether a petit jury has been impermissibly slanted in one way or another, the only concern of

⁷The only evidence Petitioner offered for consideration by the Kentucky Supreme Court in this regard was H. Zeisel, *Some Data On Juror Attitudes Toward Capital Punishment* (University of Chicago Monograph 1968) (Zeisel) (TR 270-325), which had been rejected in *Witherspoon v. Illinois*, 391 U. S. 510, 517-518 (1968), and was again rejected in *McCree, supra*, 106 S. Ct. 1758, 1763.

the Due Process Clause is with the expressed willingness of its members to fairly decide the particular case at hand. The supposed likelihood that a properly qualified juror will vote in a certain way does not matter, for "no defendant has the right to seat biased jurors whom he feels might be more sympathetic to his case." *Apodaca v. Oregon*, 406 U. S. 404, 413 (1972).

Petitioner cannot escape the reality that if the jury was constitutionally fair and impartial for purposes of resolving all the issues of guilt and punishment presented by co-defendant Stanford's case, as indeed it was according to *McCree, supra*, then it was likewise qualified to decide all the issues of guilt and punishment involved in Petitioner's case. Murder was not the only charge they shared. There were also the robbery and sodomy charges common to them. With regard to all three of these charges, the issues in Petitioner's case were eclipsed only by the additional consideration of the death penalty for Stanford's participation in the murder.

The fallacy of Petitioner's reasoning is further illustrated by considering the charge against Stanford for receiving stolen property which, although it stemmed from the other crimes here, is not an "aggravating circumstance" under Kentucky's death penalty statute, Ky. Rev. Stat. § 532.025. Thus, receiving stolen property was not an indispensable element of the capital case against Stanford. It would seem beyond cavil that the consolidation of this charge with the others against Stanford had no effect on the jury's fairness and impartiality, but that is precisely what Petitioner argues.

Under his approach, the same jury in the same case would be constitutionally impartial for purposes of the capital murder charge but impermissibly partial with respect to the charge for receiving stolen property, which brings to mind the Orwellian concept of "double-thinking." The *per se* rule that Petitioner urges would require reversal of Stanford's conviction on the lesser charge because "*Witherspoon*-excludables" were disqualified from service on the petit jury for a reason unrelated to their ability to decide that particular accusation. What he overlooks is the fact that they were excluded for a reason related to the case.

Adoption of such a rule would adversely affect the administration of criminal justice by either requiring the severance of capital and non-capital charges in all cases, or depriving States of their legitimate interest in death qualifying the jury in those instances where capital and non-capital offenses against the same defendant are consolidated for trial. One option would needlessly generate additional litigation in an already congested criminal justice system, while the other would effectively frustrate the State's legitimate capital sentencing scheme. Neither alternative is desirable.

The approach taken by Petitioner would also require severance of capital and non-capital defendants because, as in the above illustration, "*Witherspoon*-excludables" are disqualified from participation in the particular case for reasons "unrelated" to their ability to decide the fate of the non-capital offender.

Such a *per se* rule would have widespread application beyond the capital/non-capital setting as well, requiring severance in all cases where a juror is subject to excusal for cause relating to one defendant but not the other, or one charge but not the other. Such cause could be that the juror is specifically biased for or against one defendant, but not the other. The co-defendant's complaint would be the same: that the juror is excused for reasons unrelated to his ability to decide the fate of that co-defendant.

STATE INTERESTS

Here, as in all capital trials, the State has a significant interest in impanelling jurors who can "follow their instructions and obey their oaths" and who "will consider and decide the facts impartially and conscientiously apply the law as charged by the court," *Wainwright*, 469 U. S. —, 105 S. Ct. 844 (1985), quoting *Adams v. Texas*, 448 U. S. 38, 44-45, (1980). Such jurors are not uniquely an interest of the State; the "impartial jury" guaranteed to a defendant consists of just such jurors. *Witt*, 105 S. Ct. at 852.

More than that, the State has a legitimate interest in having the same jury decide the guilt and punishment of all of the participants in a crime together. Joinder of defendants for trial by the same jury invests the fact-finder with an extra degree of perspective on the whole case which it otherwise would not have had. The jury's factual determinations are more reliable because of this. It is the one way whereby the State may assure itself that one defendant's criminal

responsibility is fairly compared with that of the other. This promotes consistent results in jury sentencing, which in turn fosters public confidence in the legal system. These considerations underlie the States' joinder rules in the same way as their federal counterpart, Fed. R. Crim. P. 8(b).

Unquestionably, joint trials are more economical and minimize the burden on witnesses, prosecutors, and courts. They also avoid delays in bringing those accused of crime to trial. This much the Court concedes. It is also worth saying that separate trials are apt to have varying consequences for legally indistinguishable defendants. The unfairness of this is confirmed by the common prosecutorial experience of seeing codefendants who are tried separately strenuously jockeying for position with regard to who should be the first to be tried. *Bruton v. United States*, 391 U. S. 123 (1968) (Justice White, Dissenting).

These interests would not be served, but frustrated, by impanelling simultaneous juries. The results in that situation are as likely to be inconsistent or disparate as where the defendants are tried separately.

Petitioner's concern that in other cases, the government might death-qualify the jury only to withdraw its request for the death penalty upon receiving a conviction, overlooks two inescapable realities. First, the State cannot try *all* murder cases as capital offenses; the right to so proceed depends upon the presence of statutory "aggravating" factors. *E.g.*, Ky. Rev. Stat. § 532.025. It must be a "capital case" to begin with.

Second, having secured a conviction, the State is not then *required* to seek the death penalty. It may well be that in light of the evidence as it actually developed at trial, the prosecutor would feel that the death penalty should not be imposed. For that matter, the trial judge or the victim's family might feel that the death penalty would be inappropriate in view of the evidence adduced during trial. States should be free to withdraw requests for the death penalty without explanation, and without risking the loss of an otherwise valid conviction.

II.

Where the Defendant Himself Obtains a Psychiatric Examination in an Attempt to Obtain Involuntary Commitment, It Is Constitutionally Permissible for the State to Introduce Results From That Examination for the Sole Purpose of Rebutting Other Psychological Evidence Presented by the Defendant to Establish a Mental Status Defense.

A.

In Kentucky, a Criminal Defendant Bears the Burden of Production and Risk of Non-persuasion in Showing the Jury That His Possible Conviction for Murder Should be Mitigated to a Conviction for First Degree Manslaughter Because the Defendant Was Acting Under the Influence of "Extreme Emotional Disturbance."

The major premise of Buchanan's second argument is his claim that, in Kentucky, the *absence* of extreme emotional disturbance is an essential element of the offense of murder, on which the prosecution bears the burden of proof beyond a reasonable doubt. Buchanan's premise is fatally flawed.

To convict a person of murder in Kentucky in 1982, the prosecution was required to prove two elements: (1) "intent to cause the death of another person;" and (2) "caus[ing] the death of such person or of a third person." Ky. Rev. Stat. § 507.020(1)(a).⁸ Kentucky also recognized the crime of first degree manslaughter. A person was guilty of manslaughter in the first degree if he intentionally killed another person "under circumstances which do not constitute murder because he acts under the influence of extreme emotional disturbance."⁹

Prior to the statutory enactment of the penal code in Kentucky, the offense of murder was reduced to voluntary manslaughter where the jury found that the killing was committed, without previous malice, in a

⁸Section 507.020(1) provides in relevant part: "A person is guilty of murder when: (a) with intent to cause the death of another person, he causes the death of such person or of a third person; except that in any prosecution a person shall not be guilty under this subsection if he acted under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be. However, nothing contained in this section shall constitute a defense to a prosecution for or preclude a conviction of manslaughter in the first degree or any other crime."

⁹Ky. Rev. Stat. §507.030(1) provides in relevant part:

A person is guilty of manslaughter in the first degree when:
 . . . (b) with intent to cause the death of another person, he causes the death of such person or of a third person under circumstances which do not constitute murder because he acts under the influence of extreme emotional disturbance, as defined in subsection (1)(a) of Ky. Rev. Stat. 507.020.

sudden heat and passion or in a sudden affray upon provocation ordinarily calculated to excite the passions beyond control. *Rice v. Commonwealth*, Ky., 472 S. W. 2d 512 (1971). However, the killing of a human being with a deadly weapon raised an inference of malice and the state was not required to negate the possibility that there were circumstances reducing the homicide below that of murder or excusing it altogether. *Partin v. Commonwealth*, Ky., 445 S. W. 2d 433 (1969); *Pittman v. Commonwealth*, Ky., 242 S. W. 2d 875 (1951). The Kentucky courts noted that requiring the defendant to produce evidence in mitigation was reasonable in light of the common sense proposition that such killings did not ordinarily happen by accident. *Partin*, 445 S. W. 2d, at 435-436.

In 1975, this Court announced its decision in *Mullaney v. Wilbur*, 421 U. S. 684 (1975), ruling that the Maine murder statute was unconstitutional because it placed the burden of proof on the defendant to show that the murder charge should be mitigated because he acted in "sudden heat and passion." Shortly thereafter, the defense bar endeavored to obtain rulings from the Kentucky Supreme Court which would construe Kentucky's common law treatment of murder in such a way that Kentucky's murder provision would be rendered unconstitutional under *Mullaney*. On July 1, 1977, the Kentucky Supreme Court rendered decisions in *Brown v. Commonwealth*, Ky., 555 S. W. 2d 252 (1977) and *Burch v. Commonwealth*, Ky., 555 S. W. 2d 954 (1977) declining the public defender's

invitation to bring Kentucky's murder scheme within the purview of *Mullaney*. See, *Burch*, 555 S. W. 2d at 958.

In *Brown*, the Kentucky court held that the state bore the burden of proof in a murder prosecution, including the burden to negate "defenses" raised by the defendant. Such "defenses" included evidence suggesting that a defendant is guilty of a lesser offense. 555 S. W. 2d, at 257. However, the court noted that *Mullaney* did not require the state to produce evidence negating every fact and circumstance that could serve either to reduce the degree of or to raise an absolute defense to the crime charged. Accordingly, the court allocated the burden of production on such "defenses" to the defendant. *Id.* Furthermore, the court ruled that the state was not required to come forward with countervailing proof unless the evidence tending to support the defense was of such probative force that the defendant would otherwise be entitled to a directed verdict of acquittal. 555 S. W. 2d, at 257, 258, n.6. Respondent would submit that, under this ruling, the defendant also bore the risk of non-persuasion.¹⁰

One year later, the Kentucky Supreme Court was faced with a similar "*Mullaney*" attack on the recently enacted murder and manslaughter statutes. In *Bartrug v. Commonwealth*, Ky., 568 S. W. 2d 925 (1978), the court rejected the defendant's attempt to invali-

¹⁰In *Patterson v. New York*, 432 U. S. 197 (1977), this Court approved a similar allocation of burdens to the defendant where he raises an affirmative defense to the charge of murder.

date the statutory scheme, abandoned its ruling in *Brown*, and conclusively held that the absence of "extreme emotional disturbance" was an essential element of the offense of murder, which must be proven by the state beyond a reasonable doubt. *Bartrug*, 568 S. W. 2d, at 926.¹¹ That holding was reiterated in *Edmonds v. Commonwealth*, Ky., 586 S. W. 2d 24 (1979).

Bartrug and *Edmonds* were both implicitly overruled in *Gall v. Commonwealth*, Ky., 607 S. W. 2d 97 (1980) — two years prior to Buchanan's trial. In *Gall*, the Kentucky Supreme Court took its first opportunity to examine the statutory concept of "extreme emotional disturbance" in detail. The court concluded that this statutory concept was the common law concept of "sudden heat and passion," but with two significant changes. First, the initial element, provocation, was expanded to include any event, even words. Second, a subjective element was interjected into the remaining element — the reasonableness of the defendant's response to the provocation would be viewed from his viewpoint under the circumstances as he perceived them to be.

Following this analysis of the concept itself, the *Gall* court concluded that "extreme emotional disturbance" was a "defense," as that term was defined in *Brown*, *supra*, because it served to reduce murder to manslaughter. The *Gall* court also returned to its earlier

¹¹This is not the first time that the Kentucky Supreme Court has gone too far in attempting to comply with decisions of this Court. See, e.g., *Kentucky v. Whorton*, 441 U. S. 786 (1979).

holding in *Brown* in allocating the burdens on this issue. Recognizing that the state retained the ultimate burden of proof in a murder prosecution, the court ruled that the defendant bears the burden of production and the risk of non-persuasion on the "defense" of "extreme emotional disturbance." The court indicated that allocating these burdens to the defendant was vital to the effective enforcement of Kentucky's murder statute; otherwise, it would never be possible to convict a defendant of murder if there were no eyewitnesses and he testified that he was acting under the influence of extreme emotional disturbance.¹² *Gall*, 607 S. W. 2d, at 109.

Of equal importance was the court's finding that *Gall* had failed in his proof on the issue of extreme emotional disturbance. *Gall* had presented clinical evidence that he was suffering from paranoid schizophrenia, which was characterized as "an extreme emotional disturbance." Such evidence would assist the jury in assessing the reasonableness of *Gall*'s response, upon a showing of provocation. However, *Gall* failed to establish provocation — there were no eyewitnesses to the killing and *Gall* chose not to testify. Without proof of provocation, *Gall*'s clinical evidence simply presented an insufficient or failed insanity defense.

Finally, in *Wellman v. Commonwealth*, Ky. 694 S. W. 2d 696 (1985), the court relied on *Gall*, *supra*,

¹²In *Patterson*, *supra*, this Court recognized that this was a valid state interest. Therefore, the state may require that the defendant establish this mitigating circumstance with reasonable certainty. 432 U. S., at 207-210.

in rejecting a defendant's claim that his murder conviction should be set aside because there was no evidence of the absence of extreme emotional disturbance. The court noted that the decision in *Gall* implicitly overruled the only two cases which held that the *absence* of extreme emotional disturbance was an element of the crime of murder. In construing the import of the *Gall* decision, the court noted that mental illness may be considered by the jury in assessing the reaction by a particular defendant when there is probative, tangible and independent evidence of initiating circumstances (*i.e.*, provocation). Mental illness, by itself, does not constitute extreme emotional disturbance. *Wellman*, at 697-698.

Several principles of Kentucky law are evident from the foregoing discussion. At the time of Buchanan's trial, the prosecution was not required to prove the absence of extreme emotional disturbance as an element of the offense of murder. The mitigation issue of extreme emotional disturbance was a "defense," on which Buchanan bore the burden of production and the risk of non-persuasion. To establish this "defense," Buchanan was required to establish 1) he was provoked into an emotional disturbance, and 2) that his reaction to this provocation was reasonable, from his viewpoint under the circumstances as he believed them to be. Clinical evidence of a mental illness/disorder would support a finding that his reaction was reasonable from his viewpoint. However, without evidence of initiating circumstances, such clinical evi-

dence would simply constitute a failed insanity defense. Finally, the prosecutor was not required to produce negating evidence to sustain its ultimate burden of proof unless the defendant's evidence of extreme emotional disturbance was of such probative force that he would be entitled as a matter of law to an acquittal on the charge of murder. However, the prosecutor would be permitted to present evidence rebutting clinical testimony, to prevent confusion in the minds of the jurors.

B.

Where the Defendant Has Obtained a Psychiatric Evaluation in the Hopes of Being Involuntarily Committed, the State Does Not Violate His Privilege Against Self-incrimination by Introducing Findings From That Examination to Rebut Other Expert Evidence Offered by the Defendant in Support of His Mental Status Defense.

Buchanan grounds his Fifth Amendment claim squarely upon the Court's decision in *Estelle v. Smith*, 451 U. S. 454 (1981). Respondent will show that Buchanan's reliance upon *Estelle* is misplaced.

Faced with unique factual circumstances, the Court announced a limited holding in *Estelle*:

A criminal defendant, who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding. 451 U. S., at 468.

Stated in the converse, the *Estelle* holding provides that a criminal defendant, who initiates a psychiatric evaluation or attempts to introduce psychiatric evidence, *may* be compelled to respond to a psychiatrist. The reason for the rule is obvious. "When a defendant asserts the insanity defense and introduces supporting psychiatric testimony, his silence may deprive the state of the only effective means it has of controverting his proof on an issue that he interjected into the case." *Estelle*, 451 U. S., at 465.

Nearly all of the federal circuits have rejected Fifth Amendment claims similar to that advanced by Buchanan. See, *United States v. Byers*, 740 F. 2d 1104, 1111 (D.C. Cir. 1984) (en banc) (Scalia, J.) and the cases cited therein. The *Byers* plurality noted that the other circuits had grounded their holdings upon policy grounds that had been variously described as the need to maintain a "fair state-individual balance," a matter of "fundamental fairness," and a function of "judicial common sense." *Id.* The *Byers* plurality chose to base their holding on the policy ground advanced by the Eighth Circuit in *Pope v. United States*:¹³

It would be a strange situation, indeed, if, first, the government is to be compelled to afford the defense ample psychiatric service and evidence at government expense and, second, the govern-

¹³372 F. 2d 710, 720 (8th Cir. 1967) (en banc) *vacated and remanded on other grounds*, 392 U. S. 651 (1968), *cert. denied* 401 U. S. 949 (1971).

ment is to have the burden of proof, . . . and yet it is denied the opportunity to have its own corresponding and verifying examination, a step which perhaps is the most trustworthy means of attempting to meet that burden." *Byers*, 740 F. 2d., at 1113.¹⁴

The court also noted that the necessary balance in the criminal process can not be satisfied by merely allowing the state to cross-examine the defendant's expert witnesses. "Ordinarily, the only effective rebuttal of psychiatric opinion testimony is contradictory opinion testimony." *Byers*, 740 F. 2d at 1114. Finally, the plurality reasoned that this fair and practical limitation on the privilege against self-incrimination was supported by a long line of decisions by this Court holding that a defendant may not take the stand in his own behalf and then refuse to consent to cross-examination, citing *Fitzpatrick v. United States*, 178 U. S. 304 (1900). Based upon these considerations, the plurality joined the majority of other circuits in holding that a defendant, who raises the insanity defense, may constitutionally be subjected to a compulsory psychiatric examination and, when he introduces psychiatric testimony to support his defense, the court-appointed psychiatrists may also testify concerning that issue. *Byers*, 740 F. 2d at 1115.

¹⁴Based upon all of the considerations underlying the plurality's holding, Respondent must assume that the holding would also apply to those defendants who asserted the insanity defense through the testimony of privately-employed psychiatrists, and in those cases where the defendant bore the burden of proof on insanity. See, e.g., Ky. Rev. Stat. §§ 500.070(3) and 504.020(3).

Although *Estelle* and *Byers* focus on the insanity defense, Respondent would argue that the considerations underlying these decisions also apply to other "mental status" defenses, i.e., extreme emotional disturbance, diminished capacity, *et cetera*. In all cases where the defendant asserts one of these "mental status" defenses, the "best evidence" concerning the defense rests peculiarly within the possession of the defendant. Where the defendant raises a "mental status" defense and presents psychiatric testimony in support of that defense, the state must be allowed to test that evidence. Such a procedure is essential to the integrity of the judicial process and serves to assist juries in their determination of the truth.¹⁵ Therefore, Respondent would submit that the principles of *Estelle* and *Byers* apply to this case, where Buchanan asserted the "mental status" defense of extreme emotional disturbance and presented psychological testimony in support of that defense.

From the beginning of this case until the Kentucky Supreme Court announced its decision, Buchanan's consistent theme was that he could not be guilty of

¹⁵The Court should also note that these defendants may, in effect, "testify" through their expert witnesses, without subjecting themselves to cross-examination or impeachment. *Battie v. Estelle*, 655 F. 2d 692 (5th Cir. 1981). Such defendants should not be allowed to use the Fifth Amendment privilege as a shield to distort the truth. See, e.g., *Oregon v. Hass*, 420 U. S. 714 (1975); *Harris v. New York*, 401 U. S. 222 (1971); *United States v. Castenada*, 555 F. 2d 605 (7th Cir. 1977).

murder because he acted under the influence of extreme emotional disturbance.¹⁶

On or about August 11, 1981 while Buchanan was still before the Jefferson County Juvenile Court, his present attorney entered into a joint motion to have Buchanan examined, by a psychiatrist, to determine whether Buchanan should be involuntarily committed

¹⁶Had the prosecutor not chosen, prior to trial, to forego death as a possible penalty in petitioner's case, there is every reason to believe that Buchanan would have also relied upon this defense as a statutory mitigating circumstance during the capital sentencing proceeding.

In Kentucky, the statutory mitigating circumstances have been enumerated in Kentucky Revised Statutes § 532.025(2)(b). Subsection 532.025(2)(b)(2) provides, "The capital offense was committed while the defendant was under the influence of extreme mental or emotional disturbance even though the influence of extreme mental or emotional disturbance is not sufficient to constitute a defense to the crime."

A similar provision has been included in the death penalty statutes of twenty-one other states: Ala. Code § 13A-5-21(2) (1975); Ark. Stat. Ann. § 41-1304(1) (1977); Cal. Penal Code § 190.3(d) (Deering 1985); Fla. Stat. Ann. § 921.141 (b) (West 1985); Ill. Ann. Stat. Ch. 38, § 9-1(c)(2) (Smith-Hurd 1979); Ind. Code Ann. § 45-50-2-9 (c)(2) (Burns 1985); LA-Code Crim. Proc. Ann. art. 905.5(b) (West 1986 Supp.); Mass. Gen. Laws Ann. Ch. 279, § 54(b)(2) (West 1981); Miss. Code Ann. § 99-19-101 (6)(b) (1985 Supp.); Mo. Ann. Stat. § 565.012(3)(2) (Vernon 1979); Mont. Code Ann. § 46-18-304(2) (1985); Neb. Rev. Stat. § 200-035(2) (1985); N.J. Stat. Ann. § 2C: 11-3(5)(a) (West 1982); N.M. Stat. Ann. § 31-20A-6(4) (1978); N.C. Gen. Stat. § 15-A-2000 (f)(2) (1983); 42 Pa. Cons. Stat. Ann. § 9711 (e)(2) (Purdon 1982); SC Code Ann. § 16-3-20(C)(b)(2) (Law Co-op 1985); Utah Code Ann. § 76-3-207(1)(b) (1978); Va. Code § 19.2-264.4(b)(ii) (1983); Wash. Rev. Code Ann. § 10.95.070(2) (1980); Wyo. Stat. § 6-2-102(J) (ii) (1983).

under Ky. Rev. Stat. § 202A.026¹⁷ (hereinafter "202A"). (Tape of August 19, 1981, District Court Hearing, hereinafter, "District Tape," Digital Reading 029) Petitioner was examined by Dr. Robert T. G. Lange on August 14, 1981. (JA 72-73) Although the primary focus of the examination was to determine whether Buchanan met the 202A criteria, Dr. Lange also chose to evaluate Petitioner's competency to stand trial. (JA 72-73) During the 202A hearing,¹⁸ defense counsel unsuccessfully attempted to elicit Dr. Lange's opinion that Petitioner was mentally ill and dangerous.¹⁹ By initiating this psychiatric evaluation, defense counsel was clearly attempting to obtain a pre-emptory determination that petitioner was mentally ill. Under *Estelle* and *Byers*, the prosecutor could have properly compelled Buchanan to undergo an independent psychiatric evaluation, without violating his privilege against self-incrimination.

During later pre-trial hearings, defense counsel indicated, on two separate occasions, that he intended to present a "mental status" defense. (Transcripts of November 20, 1981 hearing, at 11-16; and December 12, 1981 hearing, at 5-8, 11) On these occasions, counsel

¹⁷Section 202A.026 provides: No person shall be involuntarily hospitalized unless such person is a mentally ill person: (1) Who presents a danger or threat of danger to self, family or others as a result of the mental illness; (2) Who can reasonably benefit from treatment; and (3) For whom hospitalization is the least restrictive alternative mode of treatment presently available.

¹⁸Apparently, the prosecutor was provided with a copy of Dr. Lange's report, prior to or during this hearing.

¹⁹See Note 17, *supra*.

strongly urged the court to bar the prosecutor from seeing the results of any court-ordered evaluation, referring to *Estelle* during one discussion. (*Id.*)

During his opening statement at trial, counsel informed the jury that a psychologist had indicated that Buchanan required treatment for an emotional disturbance. (TE 350-352) The prosecution then proved the statutory elements of murder in its case-in-chief against both Buchanan and Stanford through various witnesses. For his defense, Petitioner called one witness—Martha Elam, his social worker. (TE 1114-1145)

Through Ms. Elam's testimony, Petitioner introduced clinical evidence based upon three (3) psychological evaluations conducted prior to the time of the charged offenses. The substance of these evaluations has been summarized in Respondent's Counterstatement of the Case. However, the Court should note that, during Ms. Elam's testimony, the jury was told on five separate occasions that Buchanan was *emotionally disturbed*. (TE 1119-1125, 1134). Although this evidence simply presented a failed insanity defense under *Gall*, rather than an emotional disturbance defense, it is not surprising that the prosecutor chose to present evidence to the jury in an attempt to rebut these characterizations.²⁰

²⁰Respondent would submit that, under *Estelle* and *Byers*, the prosecutor could have stopped the trial at this point and compelled Petitioner to submit to a psychiatric evaluation, without violating his privilege against self-incrimination. See, e.g., *State v. Fair*, Conn., 496 A. 2d 461 (1985) and *State v. Lovelace*, Conn., 469 A. 2d 391 (1983).

However, when the prosecutor began to question Ms. Elam about Dr. Lange's evaluation, Petitioner objected. (TE 1139) The trial court overruled the objection, noting that defense counsel couldn't "argue about his mental status at the time of the commitment of this offense and exclude evidence when he was evaluated with reference to that mental status." (TE 1140) The trial court also overruled Petitioner's objection that introduction of Dr. Lange's evaluation would violate *Estelle*. (TE 1141-1142) Ms. Elam was then allowed to read Dr. Lange's report, excepting that paragraph entitled "Impressions," into evidence. (TE 1142-1144; JA 72-73)

At the close of the evidence, Petitioner unsuccessfully moved for a directed verdict of acquittal on the murder charge, on the ground that he had carried his burden of production on the issue of extreme emotional disturbance. (TE 1155-1159) Although the court did not believe that Petitioner had proven any emotional disturbance, he granted Petitioner's request that the jury be instructed on first degree manslaughter. (TE 1191, 1259-1262) Finally, defense counsel addressed the issue of extreme emotional disturbance during closing argument. (TE 1302-1305)

Under the principles of *Estelle* and *Byers*, the prosecutor could have compelled Buchanan to submit to a psychiatric evaluation, without violating his privilege against self-incrimination. Such an examination would have been reconstructive in nature, focusing on Buchanan's activities at the time of the crime to determine whether he was emotionally disturbed at that

time. In this case, the prosecutor employed a less-intrusive procedure. He utilized evidence already within his possession, Dr. Lange's report, to rebut Buchanan's "mental status" defense. Where the prosecutor could have compelled him to submit to a psychiatric examination, without violating his Fifth Amendment privilege, Respondent believes that the procedure employed clearly did not violate Buchanan's privilege against self-incrimination.

Furthermore, the facts of this case are easily distinguished from the facts underlying the *Estelle* decision. Dr. Lange limited his examination to a neutral determination of Buchanan's "202A" eligibility and competency, unlike the examiner in *Estelle*. As noted by the Kentucky Supreme Court, Lange's report did *not* contain any inculpatory statements by Buchanan nor any accusatory observations by Dr. Lange. *Buchanan v. Commonwealth, Ky.*, 691 S. W. 2d 210, 213 (1985). More importantly, the prosecutor did *not* use Dr. Lange's report to establish an element of the offense of murder, on which it had the burden of proof. The Fifth Amendment is not applicable in the circumstances of this case. *Estelle*, 451 U. S., at 461-466. Therefore, Dr. Lange was not required to advise Buchanan of his rights, in accordance with *Miranda v. Arizona*, 384 U. S. 436 (1966).

C.

The Fact That Defense Counsel Requested the 202A Examination Clearly Indicates That Buchanan Had an Opportunity to Consult With Counsel, Prior to the Examination.

Petitioner similarly grounds his Sixth Amendment claim on the Court's decision in *Estelle v. Smith, supra*. Respondent submits that there is no factual basis for this claim.

In the instant proceeding, the Court ordered the 202A evaluation *at the request of defense counsel*. It must be assumed that counsel conferred with Buchanan on the implications of undergoing such an examination, prior to making his motion. *See, e.g., Henderson v. Morgan*, 426 U. S. 637, 647 (1976). Buchanan's argument that there was never any notice to counsel that the state would use the results of the evaluation as rebuttal evidence is not persuasive. The trial court was not required to explain the implications of counsel's motion to him. Furthermore, counsel indicated that he was familiar with *Estelle* when he moved for further examination (Transcript of November 20, 1981 Hearing, at 13-16). Counsel should not be allowed to insist upon a psychiatric evaluation and then cry, "Foul!" when he does not obtain the desired diagnosis.

Buchanan's Sixth Amendment claim should be summarily rejected.

D.

If the Court Should Find That Buchanan's Murder Conviction Occurred After an Infringement of His Fifth or Sixth Amendment Rights, Such Error Was Rendered Harmless by the Overwhelming Evidence of His Guilt.

Respondent has shown that the procedure employed by the prosecutor did not violate Buchanan's Fifth Amendment privilege against self-incrimination or his Sixth Amendment right to counsel. However, if the Court should find some infringement of either of these rights, Respondent would submit that such a finding would only affect Buchanan's murder conviction. Although only arguably relevant to the murder conviction, the issue of extreme emotional disturbance had no bearing whatsoever on his convictions for robbery, rape, and sodomy. Respondent would further submit that, based upon the overwhelming evidence of Buchanan's guilt, any error in this case was harmless, beyond a reasonable doubt.

A federal constitutional error may be held harmless where the court is able to conclude that the error was harmless beyond a reasonable doubt. *Chapman v. California*, 386 U. S. 18, 24 (1967). The Court has applied this "harmless error" doctrine to errors found under both the Fifth and Sixth Amendments, *Moore v. Illinois*, 434 U. S. 220 (1977) and *Milton v. Wainwright*, 407 U. S. 371 (1972). The Court should also note that the Eleventh Circuit has applied the "harmless error" doctrine to a trial procedure which violated *Estelle v. Smith*, 451 U. S. 454 (1981). See *Cape v. Francis*, 741

F. 2d 1287 (11th Cir. 1984).²¹ Based upon the overwhelming evidence of Buchanan's guilt and the lack of evidence of emotional disturbance, the Court should rule that the use of Dr. Lange's report, as rebuttal evidence, did not contribute to his conviction and was, therefore, harmless beyond a reasonable doubt.

Buchanan was convicted of First Degree Murder (under a complicity theory).²² (TE 1529-1530, 1347-1348). The abundant evidence establishing Buchanan's guilt has been detailed in the Counterstatement of the Case. In considering whether any error, if such occurred, was harmless, the Court should recall that Buchanan admitted, to both Troy Johnson and to the police, that he was with Stanford when he killed Barbel Poore. (TE 484-486, 1029-1036). In addition, a forensic scientist concluded that hairs recovered from Ms. Poore's buttocks and the floorboard of her car matched head and pubic hair standards of David Buchanan. (TE 504-505, 805-806, 811)

In light of this overwhelming evidence of Buchanan's guilt, Respondent would submit that the use of Dr. Lange's report to rebut Buchanan's "mental status" defense, essentially a non-issue in this case, was harmless beyond a reasonable doubt. *Chapman v. Cali-*

²¹The factual circumstances underlying the finding of error in *Cape* are not present in this case.

²² Ky. Rev. Stat. § 502.020(2)(a) provides, "When causing a particular result is an element of an offense, a person who acts with the kind of culpability with respect to the result that is sufficient for the commission of the offense is guilty of that offense when he aids, counsels, or attempts to aid another person in planning, or engaging in the conduct causing such result."

fornia, supra. Because Dr. Lange's report did not contribute to Buchanan's conviction, the decision of the Kentucky Supreme Court should be affirmed.

CONCLUSION

WHEREFORE, Respondent respectfully urges the Court to affirm the judgment below.

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CERTIFICATE OF SERVICE

I hereby certify that four copies of the Respondent's Brief have been served by mailing to Hon. C. Thomas Hectus, and Hon. R. Allen Button, Gittleman & Barber, 635 West Main Street, Suite 400, Louisville, Kentucky 40202, Counsel of Record; and Hon. Kevin M. McNally, and Hon. M. Gail Robinson, Assistant Public Advocates, 151 Elkhorn Court, Frankfort, Kentucky 40601, Counsel of Record, this **29** day of September, 1986.

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